

Charter Submission to the Multistate Tax Commission Uniformity Committee
Wayfair Implementation and Marketplace Facilitator Work Group

To: Richard Cram

From: Charter Communications

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Charter Communications is the second largest cable operator in the United States and a leading broadband communications services company providing video, Internet, and voice services to approximately 28.1 million residential and small- to medium business customers. We sell video and online advertising inventory to local, regional, and national advertising customers. We also sell fiber-delivered communications and managed information technology solutions to large enterprise customers. In addition, we own and operate regional sports networks and local sports, news, and community channels, as well a high-capacity, two-way telecommunications network which passes over 50 million households and small and medium businesses across the United States.

Charter appreciates the opportunity to provide feedback to the MTC Uniformity Committee Wayfair Implementation and Marketplace Facilitator Work Group. The company hopes that these comments will provide a useful perspective on the issues most salient to communications taxpayers like Charter and others.

The following discussion responds to the issues raised in the Work Group's memorandum of August 29, 2019 regarding the "Prioritized Issue List." This memorandum limits the discourse to the issues viewed as the highest priority: first, the definition of marketplace facilitator, and second, the determination of tax collection responsibility. Note that roman numeral I corresponds to MTC Priority Issue #1, and roman numeral II corresponds to MTC Priority Issue #5.

I. Definition of Marketplace Facilitator

Some states have enacted legislation that broadly defines "marketplace facilitators." Aside from the burden of interstate inconsistency created by these bills, a broad statutory definition of marketplace facilitator risks capturing companies that state legislatures and tax administrators may not have intended to reach. Such broad definitions could impose the collection requirement on communications companies simply because the company owns or operates the internet infrastructure or broadcasting network over which advertising is provided and a transaction occurs.

Consider Nevada's law, which defines, in part, a marketplace facilitator as one who "[d]irectly or indirectly ... [o]wns, rents, licenses, makes available or operates any electronic or physical infrastructure or any property, process, method, copyright, trademark or patent that connects marketplace sellers to purchasers for the purpose of making retail sales of tangible personal property ...". There, the words "infrastructure" and "method" suggest the statute could apply to a broadband internet provider that offers advertising and connects the seller and buyer through its internet service, even though the internet provider has little to no visibility to their interaction.

Similarly, the broad definition could create issues for some companies who merely advertise the sale of goods. Most providers offering advertising service are compensated on a “per-click” or per-time-slot basis. Thus, the provider only knows, at most, whether a potential buyer clicked on the link to the advertising seller’s website. The provider does not know if the buyer completes a purchase, what items or services were purchased, or even the shipping address of the ultimate consumer. The provider never collects or processes payments, nor does it know the total of any sale completed on the third-party seller’s website. It would be impossible for such a “facilitator” to collect and remit the tax when they are not party to the taxable transaction, but the laws may require it to do so nonetheless.

Although it would be unreasonable for a state to apply such a broad reading—without narrow tailoring—these broad definitions include companies without any real connection to a transaction, who would be put in jeopardy in the event others don’t collect. In addition, a broad definition may potentially create more than one marketplace in a unique transaction, which may create confusion about which entities must collect or present the risk of double taxation. These potential collection quagmires highlight the practical need for a more concise “facilitator” definition, limited only to the key parties to the transaction. Though we appreciate the efforts of certain legislatures to ensure that their statutory language precludes any attempt by true facilitators to avoid the collection requirement, simplified language can achieve the same result. Maryland’s statute is a good example. Its statute defines a marketplace facilitator as one who “[f]acilitates a retail sale by a marketplace seller by listing or advertising tangible personal property for sale in a marketplace, and [d]irectly or indirectly through agreements with third parties collects payment from a buyer and transmits the payment to the marketplace seller.” Paired with a few statutory exclusions, this narrow definition targets only those actors directly involved in the buyer-seller exchange.

We strongly advocate for the narrower definition so that companies that are only tangentially associated with a particular transaction are not inadvertently swept into collection, audit, and assessment responsibilities and risks.

II. Determination of Collection Responsibility

Communications companies are subject to a complex regime of federal, state, and local taxes and fees. Unlike sales of tangible personal property, which are usually only subject to sales tax administered by a department of revenue, communications services are subject to multiple taxes and fees, often administrated outside the department of revenue. In consideration of these complex regimes, the industry is concerned that enacted marketplace facilitator legislation applies only to state sales and use taxes and does not address other taxes. Moreover, the legislation has no flexibility in crafting alternative collection models when it comes to applying sales tax to complicated services where the seller has specialized knowledge on the application of sales tax. The failure to address these questions can create numerous complications:

First, facilitators may not be able to determine the proper sales tax base. Many states require that other taxes and fees be included in the sales tax base, but a facilitator may not be able to do so if it is responsible only for the sales tax.

Second, facilitators may not be able to collect special taxes and fees (such as 911 fees or universal service fund charges) when the marketplace is not connected to the financial transaction.

Third, administration will become inordinately complex. Certain transactions may trigger other applicable taxes beyond sales and use taxes that an entity other than the facilitator must collect. If two or more different entities are responsible for collecting the various taxes and fees arising from a single transaction, the entities will struggle to develop coordinated collection systems and customers will be confused. Many business customers of communications companies, for example, receive a single bill detailing all state and local transaction fees payable to multiple states. This billing norm will become impossible where a jurisdiction requires the seller to collect some taxes and fees, but requires a facilitator to collect sales tax.

To address these issues, it may be simpler if the parties could assign or waive out of responsibility. Yet most of the current marketplace facilitator legislation does not allow for assignment of tax responsibility to sellers, even where the sellers have traditionally collected or have agreed with the facilitator to collect the tax.

In sum, the purpose of marketplace facilitator legislation is not to unduly burden taxpayers, foster miscommunication between businesses and consumers, or compromise the efficiency of the collection system. The following suggestions could work independently or concomitantly to solve such problems.

a. Single-party collection responsibility

To alleviate some of the issues described above, the default rule should be that a single entity—either the seller *or* facilitator—must collect and remit all applicable taxes and fees related to the transactions covered by marketplace facilitator laws. Yet exceptions to the default rule should be available where appropriate, and the following subsections suggest mechanisms to provide such exceptions.

b. Contractual agreement between facilitator and seller

Prior to the enactment of the marketplace facilitator collection framework, businesses had great flexibility to contractually assign tax collection and remittance liability to a specific entity involved in the sale and delivery of products and services. Entities often executed such contracts because only one of the parties had the capability to collect and remit complex and specialized taxes, such as communications taxes. However, almost none of the current marketplace facilitator bills allow these contracts, and the laws would render invalid those contracts already in existence. This approach effectively bars the communications industry and facilitators from entering into otherwise-beneficial business arrangements conducive to selling products and services in new and novel marketplaces.

Although we understand the concern that facilitators could force sellers to agree to retain responsibility and skirt the intent of the legislation, we believe that the laws must provide for limited instances when the responsibility could remain with the seller pursuant to a mutual contractual arrangement. A few states (namely, Nevada and New Jersey) have taken the sensible approach and provided such a statutory contractual exemption. These contractual agreements should be respected when

sellers meet certain requirements. These requirements could include: 1) the seller makes sales generating revenue over certain thresholds; 2) that the seller is registered in every jurisdiction where the product and service can be sold by the facilitator; and 3) that the seller is in good standing with the impacted taxing jurisdictions. Note, however, that New Jersey's statute suggests that even an acquiescent approach is reasonable: it states simply that "[n]othing in this section shall be construed to interfere with the ability of a marketplace facilitator and a marketplace seller to enter into an agreement with each other regarding the collection and payment of tax imposed under [the Sales and Use Tax Act]."

c. Waiver of collection requirement

Another option would be to implement an automatic, objective waiver process that would exempt the facilitator from collecting and remitting applicable taxes if the marketplace seller meets certain requirements. Such a waiver could require that the seller: 1) reach a mutual agreement with the facilitator to collect and remit applicable taxes; 2) has annual U.S. gross sales over \$1 billion, including the gross sales of any related entities; 3) provides evidence to the marketplace facilitator that it is registered under [cite code section] in the state and is registered to collect sales and use tax in every state where the product or service can be sold; and 4) notifies [the Department] in a manner prescribed by [the Department] that the marketplace seller will collect and remit all applicable taxes and fees on its sales through the marketplace and is liable for failure to collect or remit applicable taxes and fees on its sales.